

EX PARTE OR LATE FILED



Federal Communications Commission  
Washington, D.C. 20554  
MAY 27 1998

DOCKET FILE COPY ORIGINAL

RECEIVED

JUN - 1 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

The Honorable Dick Armey  
Member, U.S. House of Representatives  
9901 Valley Ranch Parkway, Suite 3050  
Irving, Texas 75063

Dear Congressman Armey:

Thank you for your inquiry on behalf of your constituent, Mayor Morris Parrish, Irving, Texas, concerning the placement and construction of facilities for the provision of personal wireless services and radio and television broadcast services in his community. Your constituent's letters refer to issues being considered in three proceedings that are pending before the Commission. In MM Docket No. 97-182, the Commission has sought comment on a Petition for Further Notice of Proposed Rule Making filed by the National Association of Broadcasters and the Association for Maximum Service Television. In this proceeding, the petitioners ask the Commission to adopt a rule limiting the exercise of State and local zoning authority with respect to broadcast transmission facilities in order to facilitate the rapid build-out of digital television facilities, as required by the Commission's rules to fulfill Congress' mandate. In WT Docket No. 97-192, the Commission has sought comment on proposed procedures for reviewing requests for relief from State and local regulations that are alleged to impermissibly regulate the siting of personal wireless service facilities based on the environmental effects of radio frequency emissions, and related matters. Finally, in DA 96-2140 and FCC 97-264, the Commission twice sought comment on a Petition for Declaratory Ruling filed by the Cellular Telecommunications Industry Association seeking relief from certain State and local moratoria that have been imposed on the siting of commercial mobile radio service facilities.

Because all of these proceedings are still pending, we cannot comment on the merits of the issues at this time. However, I can assure you that the Commission is committed to providing a full opportunity for all interested parties to participate. The Commission has formally sought public comment in all three proceedings and, as a result, has received numerous comments from State and local governments, service providers, and the public at large. Your constituent's letters, as well as this response, will be placed in the record of all three proceedings and will be given full consideration.

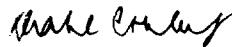
4

At the same time, the Commission is actively pursuing initiatives that we hope will render any Commission action limiting State and local authority unnecessary. Commission staff, working with the Commission's Local and State Government Advisory Committee, is bringing together representatives of industry and municipal governments to discuss mutually acceptable solutions to the challenges posed by facilities siting. Chairman Kennard has stated that preemption of local zoning authority should be a remedy of last resort, and that the Commission should not consider preemption until the possibilities for constructive dialogue have been exhausted.

Further information regarding the Commission's policies toward personal wireless service facilities siting, including many of the comments in the two proceedings involving personal wireless service facilities, is available on the Commission's internet site at <http://www.fcc.gov/wtb/siting>.

Thank you for your inquiry.

Sincerely,



for Steven E. Weingarten  
Chief, Commercial Wireless Division  
Wireless Telecommunications Bureau

cc: CWD  
Dockets (2)  
John Conwell  
j:\congress\9801048

**CONGRESSIONAL**  
**referral to headquarters**

WJB  
97-182  
1048

DATE: January 21, 1998


**TO:** Samantha Peoples, Mail Stop 1500

**FM:** Dallas, Texas

**Member of Congress:** Congressman Dick Armey

**Subject:** Preempt Local Zoning

The attached correspondence raises policy issues which are so novel that the field does not have current information and cannot obtain a Commission policy statement or response to these issues is expressly reserved for CIB headquarters or another bureau.

  
James D. Wells  
District Director

Date recd by OBC 1/24/98

Date dlvr'd to OLA 1/30/98

Initials: SP

RECEIVED DEC 22 1997



November 19, 1997

MORRIS H. PARRISH  
MAYOR

Representative Dick Armey  
301 Cannon House Office Bldg.  
Washington, D.C. 20515

Dear Representative Armey:

We are writing you about the Federal Communications Commission and its attempts to preempt local zoning of cellular, radio and TV towers by making the FCC the "Federal Zoning Commission" for all cellular telephone and broadcast towers. Both Congress and the courts have long recognized that zoning is a peculiarly local function. Please immediately contact the FCC and tell it to stop these efforts which violate the intent of Congress, the Constitution and principles of Federalism.

In the 1996 Telecommunications Act, Congress expressly reaffirmed local zoning authority over cellular towers, thanks in great part to your effort. It told the FCC to stop all rulemakings where the FCC was attempting to become a Federal Zoning Commission for such towers. Despite this instruction from Congress, the FCC is now attempting to preempt local zoning authority in three different rulemakings.

**Cellular Towers - Radiation:** Congress expressly preserved local zoning authority over cellular towers in the 1996 Telecommunications Act with the sole exception that municipalities cannot regulate the radiation from cellular antennas if it is within limits set by the FCC. The FCC is attempting to have the "exception swallow the rule" by using the limited authority Congress gave it over cellular tower radiation to review and reverse any cellular zoning decision in the U.S. which it finds is "tainted" by radiation concerns, even if the decision is otherwise perfectly permissible. In fact, the FCC is saying that it can "second guess" what the true reasons for a municipality's decision are, need not be bound by the stated reasons given by a municipality and doesn't even need to wait until a local planning decision is final before the FCC acts.

Some of our citizens are concerned about the radiation from cellular towers. We cannot prevent them from mentioning their concerns in a public hearing. In its rulemaking the FCC is saying that if any citizen raises this issue that this is sufficient basis for a cellular zoning decision to immediately be taken over by the FCC and potentially reversed, even if the municipality expressly says it is not considering such statements and the decision is completely valid on other grounds, such as the impact of the tower on property value or aesthetics.

**Cellular Towers - Moratoria:** Relatedly, the FCC is proposing a rule banning the moratoria that some municipalities impose on cellular towers while they revise their zoning ordinances to accommodate the increase in the numbers of these towers. Again, this violates the Constitution and the directive from Congress preventing the FCC from becoming a Federal Zoning Commission.

**Radio/TV Towers:** The FCC's proposed rule on radio and TV towers is as bad: It sets an artificial limit of 28 to 45 days for municipalities to act on any local permit (environmental, building permit, zoning or other). Any permit request is automatically deemed granted if the municipality doesn't act in this timeframe, even if the application is incomplete or clearly violates local law. And the FCC's proposed rule would prevent municipalities from considering the impacts such towers have on property values, the environment or aesthetics. Even safety requirements could be overridden by the FCC! And all appeals of zoning and permit denials would go to the FCC, not to the local courts.

This proposal is outrageous when broadcast towers are some of the tallest structures known to man -- over 2,000 feet tall, taller than the Empire State Building. The FCC claims these changes are needed to allow TV stations to switch to High Definition Television quickly. But *The Wall Street Journal* and trade magazines state there is no way the FCC and broadcasters will meet the current schedule anyway, so there is no need to violate the rights of municipalities and their residents just to meet an artificial deadline.

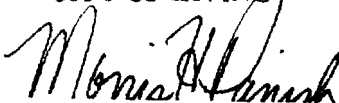
These actions represent a power grab by the FCC to become the Federal Zoning Commission for cellular towers and broadcast towers. They violate the intent of Congress, the Constitution and principles of Federalism. This is particularly true given that the FCC is a single purpose agency, with no zoning expertise, that never saw a tower it didn't like.

Please do three things to stop the FCC: First, write the new FCC Chairman William Kennard and FCC Commissioners Susan Ness, Harold Furchtgott-Roth, Michael Powell and Gloria Tristani telling them to stop this intrusion on local zoning authority in cases WT 97-197, MM Docket 97-182 and DA 96-2140; second, join in the "Dear Colleague Letter" currently being prepared to go to the FCC from many members of Congress; and third, oppose any effort by Congress to grant the FCC the power to act as a "Federal Zoning Commission" and preempt local zoning authority.

The following people at national municipal organizations are familiar with the FCC's proposed rules and municipalities' objections to them: Barrie Tabin at the National League of Cities, 202-626-3194; Eileen Huggard at the National Association of Telecommunications Officers and Advisors, 703-506-3275; Robert Fogel at the National Association of Counties, 202-393-6226; Kevin McCarty at the U.S. Conference of Mayors, 202-293-7330; and Cheryl Maynard at the American Planning Association, 202-872-0611. Feel free to call them if you have questions.

Very truly yours,

CITY OF IRVING



Morris Parrish  
Mayor

Cc: (see attached list)

## COPY LIST

~~Senator Jack McGinnis~~  
241 SROB  
Washington, DC 20510-0303

Senator Conrad Burns  
187 SDOB  
Washington, DC 20510-2603

~~Senator Kay Bailey Hutchison~~  
283 SROB  
Washington, DC 20510-4304

Senator Slade Gorton  
730 SHOB  
Washington, DC 20510-4701

Senator Dianne Feinstein  
331 SHOB  
Washington, DC 20510-0504

Representative Tim Bliley  
2409 RHOB  
Washington, DC 20515-4607

Representative W. J. Tauzin  
2183 RHOB  
Washington, DC 20515-1803

Representative Edward J. Markey  
2133 RHOB  
Washington, DC 20515-2107

Representative John D. Dingell  
2328 RHOB  
Washington, DC 20515-2216

Representative Bob Goodlatte  
123 CHOB  
Washington, DC 20515-4606

Representative James Moran  
1214 LHOB  
Washington, DC 20515-4608

Representative Bart Stupak  
1410 LHOB  
Washington, DC 20515-2201

Representative Joe Barton  
2264 RHOB  
Washington, DC 20515-4306

Ms. Barrie Tabin  
Legislative Counsel  
National League of Cities  
1301 Pennsylvania Ave., NW, 6<sup>th</sup> Floor  
Washington, DC 20004

Ms. Eileen Huggard  
Executive Director  
NATOA  
1650 Tysons Blvd., Suite 200  
McLean, VA 22102-3915

Mr. Robert Fogel  
~~Associate Legislative Director~~  
National Association of Counties  
440 First Street, NW, 8<sup>th</sup> Floor  
Washington, DC 20001

Mr. Kevin McCarty  
Assistant Executive Director  
U.S. Conference of Mayors  
1020 Eye Street, 4<sup>th</sup> Floor  
Washington, DC 20006

Ms. Cheryl Maynard  
Government Affairs Coordinator  
American Planning Association  
1776 Massachusetts Ave., NW, 4<sup>th</sup> Floor  
Washington, DC 20036



MORRIS H. PARRISH  
MAYOR

November 19, 1997

Mr. William Kennard  
Chairman Designate  
Federal Communications Commission  
1919 M Street, NW  
Washington, DC 20554

*Ex Parte Letter Re: Cases WT-97-197, MM Docket 97-182, and DA 96-2140*

Dear Chairman Kennard:

Please terminate all action in the preceding cases. They attempt to make the FCC the "Federal Zoning Commission" for cellular and broadcast towers and violate the intent of Congress, the Constitution and principles of Federalism.

Congress and the courts have long recognized that zoning is a matter of peculiarly local concern. The FCC has no zoning knowledge or expertise and is not accessible to most citizens.

For these reasons and others, Congress expressly preserved local zoning authority over cellular towers in the 1996 Act. Now the FCC is trying to get this jurisdiction back by issuing rules that improperly infringe on local zoning authority.

The FCC's efforts to assume jurisdiction over any local zoning matter where RF radiation is mentioned is unacceptable. The FCC ignores the fact that we cannot necessarily control the statements citizens make during meetings of our legislative bodies. Many municipalities, by state or local law, are required to allow citizens to speak on any topic they wish, even on items that are not on the agenda. This is part of what local government is all about.

Some of our citizens may be concerned about radiation from cellular towers. For the reasons just described we cannot necessarily prevent them from mentioning their concerns to us. The FCC's attempt to use this as a means to seize zoning authority and reverse local decisions violates basic principles of Federalism, Freedom of Speech and the rights of our citizens to petition their government.

This is particularly true if a municipality expressly says it is not considering such statements (that go beyond the radiation authority Congress left with municipalities) and the decision is completely valid on other grounds, such as the impact of the tower on property values or aesthetics.



For similar reasons the FCC cannot "second guess" the reasons for a municipality's decision. The FCC, like the courts, is bound by the stated reasons given by a municipality. Either those reasons are sufficient to uphold the decision or they are not. The FCC cannot "second guess" a municipality's true reasons any more than the courts can "second guess" the true reasons for the FCC's decisions.

The FCC's proposal to ban moratoria on cellular towers is objectionable for many of the reasons set forth above. It also fails to recognize that for some municipalities moratoria are a well-recognized zoning tool, particularly while they revise zoning ordinances. More importantly, Congress took away the FCC's authority over cellular tower zoning, and this includes moratoria

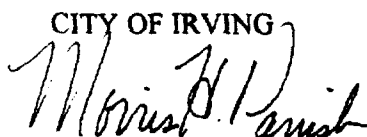
Similarly, please terminate the FCC's proposed rulemaking preempting local zoning of broadcast towers. As you well know, broadcast towers can be over 2,000 feet high -- they are some of the tallest structures known to man. It is therefore astounding that you would propose that municipalities can't consider the impact of such towers on property values, the environment or aesthetics and that even safety considerations take second place. Safety always has to be the first priority.

And setting artificial time limits for municipalities to act on environmental, zoning and building permit approvals for such towers serves no useful purpose. It is a violation of the U.S. Constitution, the Communications Act and Federalism for you to put time limits on municipalities to act on all local approvals and then state that all such applications will be automatically deemed granted if we don't act within this timeframe, even if the application is incomplete or violates state or local law.

The FCC should consider how it would react if it was told that any broadcast license application would be automatically deemed granted unless the FCC acted on it within 21 to 45 days; that this rule applied whether or not the application was complete; whether or not the applicant was foreign or domestically owned or otherwise qualified; or even whether the frequencies were available. And the rule would apply without regard to whether the tower for the station was at the end of an airport runway, in a wetland or in a historic district.

For these reasons the proposed actions all violate the Communications Act and the Constitution. Please terminate all these proceedings without taking the actions proposed therein.

Very truly yours,

CITY OF IRVING  
  
Morris Parrish  
Mayor

/dj

cc: Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission (6 copies)  
1919 M. Street, NW  
Washington, DC 20054

Cc: (see attached)

## LIST OF COPIES

Commissioner Designate Harold Furutogou-Rouh  
1919 M Street, 8<sup>th</sup> Floor  
Washington, DC 20554

Commissioner Designate Michael Powell  
1919 M Street, 8<sup>th</sup> Floor  
Washington, DC 20554

Commissioner Designate Gloria Tristani  
1919 M Street, 8<sup>th</sup> Floor  
Washington, DC 20554

Commissioner Susan Ness  
1919 M Street, 8<sup>th</sup> Floor  
Washington, DC 20554

Shaun A. Maher, Esq.  
Policy & Rules Branch  
Commercial Wireless Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street  
Washington, DC 20554

Mr. Keith Larsen  
Assistant Bureau Chief for Engineering  
Policy & Rules Division  
Mass Media Bureau  
Federal Communications Commission  
1919 M Street  
Washington, DC 20554

Ms. Susanna Swerling  
Policy & Rules Division  
Mass Media Bureau  
Federal Communications Commission  
1919 M Street  
Washington, DC 20554

Ms. Rosalind Allen, Deputy Chief  
Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street  
Washington, DC 20554

Mr. Dan Frydman  
Acting Chief  
Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street  
Washington, DC 20554

Mr. Roy J. Stewart  
Chief  
Mass Media Bureau  
Federal Communications Commission  
1919 M Street  
Washington, DC 20554

Ms. Barrie Tabin  
Legislative Counsel  
National League of Cities  
1301 Pennsylvania Ave., NW  
6<sup>th</sup> Floor  
Washington, DC 20004

Ms. Eileen Huggard  
Executive Director, NATOA  
1650 Tysons Boulevard, Suite 200  
McLean, VA 22102-3915

Mr. Robert Fogel  
Associate Legislative Director  
National Association of Counties  
440 First Street, NW, 8<sup>th</sup> Floor  
Washington, DC 20001

Mr. Kevin McCarty  
Assistant Executive Director  
U.S. Conference of Mayors  
1620 Eye Street, 4<sup>th</sup> Floor  
Washington, DC 20006

Ms. Cheryl Maynard  
Government Affairs Coordinator  
American Planning Association  
1776 Massachusetts Ave., NW, 4<sup>th</sup> Floor  
Washington, DC 20036

CITY OF IRVING

COUNCIL RESOLUTION NO. 11-20-97-692

FEDERAL GOVERNMENT CANNOT AND SHOULD NOT INTRUDE

---

WHEREAS, the Federal Communications Commission (FCC) proposes to make the FCC a "Federal Zoning Board" and:

- Violate principles of Federalism, where zoning is recognized as being a local concern on which the ~~Federal government cannot and should not intrude.~~
- Violate the Federal telecommunications statutes which, with cellular towers in particular, preserve local zoning authority and prevent the FCC from becoming involved on zoning matters.
- Represent an unprecedented intrusion on local affairs where the FCC can "second guess" true motives for municipal decisions, even where a decision completely complies with applicable law.
- Violates the freedom of speech and right to petition government for municipalities and their residents, by threatening to penalize cities and residents that express concern over radiation from cellular antennas, even if they do so in ways specifically allowed by Congress and the Constitution.  
~~environmental concerns from being considered in~~
- On broadcast towers, violate constitutional and other protections by allowing some of the tallest structures known to mankind (over 2,000 feet tall) to be built without any local approval and impose timing constraints which bear no relation to local zoning procedures or constitutional protections.
- Improperly prevent property values, aesthetics, or ~~environmental concerns from being considered in~~ zoning broadcast and TV towers and even specify that safety considerations are not paramount.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF IRVING, TEXAS:

SECTION I. THAT the City Council hereby urges the United States Congress and the Federal Communications Commission to oppose attempts to preempt local zoning of cellular, radio and television facilities and to oppose any national zoning for cellular and broadcast towers.

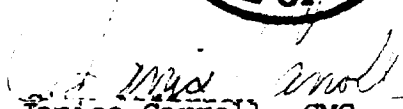
SECTION II. THAT the Mayor is authorized to execute the attached letters and transmit them to their respective addressees.

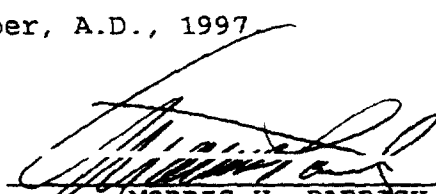
SECTION III. THAT this resolution shall take effect from and after its final date of passage, and it is accordingly ordered.

PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF IRVING, TEXAS, this 20th day of November, A.D., 1997

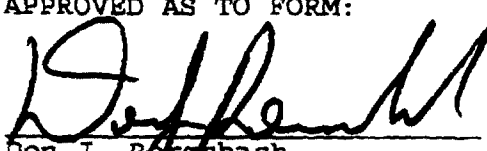


ATTEST:

  
Janice Carroll, CMC  
City Secretary

  
MORRIS H. PARRISH  
MAYOR

APPROVED AS TO FORM:

  
Don J. Rorschach  
City Attorney